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No. 04-1152

Supreme Court, U.S.
FILED
SEP 21 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC
AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE ASSOCIATION OF AMERICAN LAW SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Association of American Law Schools, Inc. (AALS) is a non-profit educational organization that has as its purpose "the improvement of the legal profession through legal education." AALS Bylaw 1-2. Formed in 1900, AALS serves the legal community as a learned society of law teachers and is legal education's principal representative to the federal government and to other higher education organizations and learned societies. AALS membership standards require, *inter alia*, that member schools pursue policies that ensure their students equal opportunity and nondiscrimination on the basis of sexual orientation. Of the 188 law schools accredited by the American Bar Association in this country, 166 currently meet AALS standards of membership and are AALS members.

Only rarely does the AALS seek to become involved in litigation as *amicus curiae*, and then only in matters involving issues with far-reaching impact on fundamental aspects of legal education. The issue presented in this case is, without question, such an issue. AALS is deeply troubled by the provisions of federal law challenged here, which conflict with the core values of AALS policy and the nondiscrimination obligations of AALS member law schools. AALS also has a strong interest in the correct description and interpretation of AALS policies, including the "amelioration policy" that has been the subject of much discussion in this litigation. In particular, AALS seeks to

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

make clear that its amelioration policy is not an adequate substitute, either factually or as a legal matter, for a true nondiscrimination requirement.

STATEMENT

1. Law schools play a vital role in ensuring that students not only learn the law but also appreciate and pursue fairness and social justice. Indeed, a "core value" shared by AALS and its member law schools is a "devot[ion] to fostering justice and public service in the legal community." AALS Bylaw 6-1(b)(i). Thus, an 1874 description of the broad law school mission remains quite apt: "a law school is not simply the place for training students '"to plead causes, to give advice to clients, to defend criminals,'" but '"the place of instruction in all sound learning relating to the foundations of justice.'" J.A. 66 (quoting then-President Woolsey of Yale Law School). Put simply, '"[l]aw and justice are meant to go together.'" J.A. 194 (quoting statement of Richard Matasar, Dean and President of New York Law School).

In furtherance of this broad mission to promote free thought and inculcate principles of justice, law schools across the country have sought to create supportive, inclusive, and tolerant learning environments for their students. In particular, AALS and its member law schools have long believed that discrimination is antithetical to their mission, and have expressed and enforced principles of nondiscrimination in all aspects of the law school experience. As part of this effort to eliminate discrimination in legal education, AALS has required its members to avoid discrimination on the basis of race or color since 1951, and on the basis of sex since 1970.

The AALS nondiscrimination policy is based on a deeply held view that "an environment sufficiently conducive to

teaching and learning is not possible if harmful, irrational discrimination is supported or condoned by the school." J.A. 211-12. Rather, "[i]t is only by the free expression of ideals and beliefs from individuals with a variety of viewpoints and personal experiences that the . . . goal of teaching the law can be achieved." J.A. 54; *see* J.A. 32, 67, 136, 195-96, 213, 227-30. As the district court aptly explained, law schools' nondiscrimination policies "serve both pedagogical and instrumental purposes by teaching values students would not otherwise learn from case books and by fostering an environment of free and open discourse." Pet. App. 95a. Far from shutting out points of view, enforcing a nondiscrimination policy actually creates an environment in which competing views can develop. *See, e.g.*, J.A. 228-30.

AALS and its member schools not only prohibit discrimination by the schools themselves, but also seek "to ensure that each and every student ha[s] the opportunity to be considered on their merits by each and every employer" using the schools' career services offices. J.A. 58. Thus, it is AALS policy that "[a] member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation." AALS Bylaw 6-3(b). AALS and its members seek to ensure a nondiscriminatory recruiting process because "abetting a discriminatory employer's recruiting efforts undermines the values" that AALS member seek to promote. J.A. 196; *accord, e.g.*, J.A. 57-58 ("The Law School was not merely interested in conveying the message that it did not believe in discrimination; it also wished to convey the message that it would not tolerate discrimination and would not be seen to tolerate it expressly or implicitly."). As one law school official has explained, in representative reasoning, nondiscrimination in recruiting is "integral to . . .

equality of opportunity and critical inquiry," because "[a]nyone on campus who discriminates in ways that the Law School considers invidious strikes at heart of [the School's] values," and "threatens to shatter the setting of openness and sensitivity that the Law School strives so hard to cultivate." J.A. 69; *see, e.g.*, J.A. 212-13, 230-31.

2. In the late 1970s, law schools began to add sexual orientation to the list of prohibited categories of discrimination. *See, e.g.*, J.A. 69-72 (Yale); J.A. at 150-51 (New York University). Reflecting this emerging trend, the AALS House of Representatives voted unanimously to amend the AALS Bylaws in 1990 to include sexual orientation in the nondiscrimination policy. That policy, codified as AALS Bylaw 6-3(b), now provides in relevant part:

> A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, *or sexual orientation*. A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity.

AALS Bylaw 6-3(b) (emphasis added).

Further, the AALS Executive Committee Regulations implement Bylaw 6-3(b) in the following language:

> A member school shall inform employers of its obligation under Bylaw 6-3(b), and shall require

> employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-3(b).... A member school has an obligation to investigate any complaints concerning discriminatory practices against its students to assure that placement assistance and facilities are made available only to employers whose practices are consistent with the principles of equal opportunity stated in Bylaw 6-3(b).

AALS Executive Committee Regulation 6-3.2. By the end of 1990, all AALS members – more than 160 law schools at the time – had adopted nondiscrimination recruiting policies covering sexual orientation.

These schools rejected the view – which the government continues to hold today, *see* U.S. Br. at 6-7 – that "sexual orientation discrimination was not as serious a matter as sex or race discrimination." J.A. 70. Rather, as these schools recognized, gay, lesbian, and bisexual students largely felt compelled to hide their sexuality based on the widely held perception "that you could not have a successful legal career if you were professionally open about your minority sexual orientation." J.A. 68. As Professor William Eskridge – now a leading scholar on sexuality and the law – recollects about his time at Yale Law School in the 1970s, just prior to Yale's extension of nondiscrimination to sexual orientation:

> As a closeted gay student, I assumed that being secretive about one's sexual orientation was part of the nature of things and that neither the law nor our professors offered us any hope for more dignified treatment. I was resigned to this reality, but several

> of my student colleagues were not. Their activism proved to be a transforming event in the history of the Yale Law School and in my own life.

J.A. 68-69. Thus, "[t]he point" of extending nondiscrimination policies to include sexual orientation was the harm suffered by gay students from the "necessity of concealment of homosexuality, and consequences of such concealment." J.A. 71.

The effect of AALS members' decision to outlaw discrimination based on sexual orientation cannot be overstated. As Professor Eskridge explains, Yale's 1978 policy decision – the decision ultimately reached by *all* AALS members – was perceived by lesbian, gay, and bisexual students "as a signal that they were accepted as equal members, perhaps for the first time, by the Law School community." J.A. 71. Moreover, this policy started Yale down the path of being "a center for fact-based and critical thinking about issues of sexuality, gender, and the law." J.A. 72. Indeed, as Professor Eskridge points out, the work of Yale professors and students informed much of the open legal debate that surrounded this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). *See* J.A. 73-74. In sum, Yale's experience shows that a law school's "welcoming attitude . . . to sexual and gender minorities" has a "direct payoff in the intellectual life of the Law School," as well as "an influence beyond" school walls. J.A. 72.

3. In various forms over the years, the United States Armed Forces have imposed a ban on lesbian, gay and bisexual service members. *See* 10 U.S.C. § 654. Thus, the military generally could not offer "an assurance of the employer's willingness to observe the principles of equal opportunity stated" in the AALS Bylaws. AALS Executive

Committee Regulation 6-3.2. As a result, AALS member schools prohibited or restricted military on-campus recruiting in various ways throughout the 1980s and early 1990s. *See* J.A. 35, 78-81, 215.

In light of this on-campus resistance, but notwithstanding the apparent absence of any adverse impact on military recruiting, Congress in 1994 passed the first version of the so-called "Solomon Amendment," named for former Representative Gerald Solomon. The 1994 version of the Solomon Amendment denied Department of Defense funds "to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes . . . entry to campuses or access to students on campuses." National Defense Authorization Act for Fiscal Year 1995, § 558, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

As the district court explained, "[t]he apparent impetus for the Solomon Amendment was the continued refusal of many educational institutions to allow the military to engage in on-campus recruiting," Pet. App. 91a – not a crisis in military recruiting. Indeed, the Department of Defense did not support passage of the Amendment in 1994, viewing it as "'unnecessary, duplicative, and potentially harmful to defense research initiatives.'" *Id.* at 92a n.2 (quoting 140 Cong. Rec. H3863 (1994) (Rep. Underwood)).

Although the Amendment's supporters cited the military's recruiting needs as a justification, Representative Solomon made clear the symbolic nature of the legislation, urging his colleagues to support the legislation and thereby

> tell[] recipients of F[e]deral money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is

> your first-amendment rights. But do not expect Federal Dollars to support your interference with our military recruiters.

Pet. App. 91a n.2 (quoting 140 Cong. Rec. H3861 (1994)). Co-sponsor Representative Pombo similarly made clear that the point of the Amendment was to "'send a message over the wall of the ivory tower of higher education,'" to combat the "'growing, and misguided, sense of moral superiority.'" *Id.* at 91a n.2 (quoting 140 Cong. Rec. H3863 (1994)).

4. In its initial iteration, the Solomon Amendment had little effect on law schools because it restricted only federal funds provided through the Department of Defense, a grant source largely irrelevant to law schools. Thus, addressing the Solomon Amendment in 1996, AALS reaffirmed its policy against discrimination in the recruiting process, stating that, with respect to military recruiters, "[m]ember schools should not . . . schedule on-campus interviews, assist in scheduling interviews, include military job opportunities in lists of employers who solicit resumes, or forward law students' resumes to such employers." AALS Memorandum 96-15, May 28, 1996, at 5. AALS made clear the danger of compromising its nondiscrimination principles: "The fundamental policy concerning discrimination . . . would be seriously undermined if those nondiscrimination principles were abandoned when law students seek employment in the legal profession," and would "work[] a palpable injury to those students." *Id.* at 2. It was thus only in the limited context of a conflicting demand from a "higher authority" – state law or a school's parent university – that the AALS contemplated potential law school noncompliance and amelioration measures. *See id.* at 5-6.

Soon after the Solomon Amendment was first passed, however, Congress amended the law to restrict funds not only from the Department of Defense, but also from the Departments of Labor, Health and Human Services, Education, and related agencies. Omnibus Consolidated Appropriation Act, 1997, § 514(b), Pub. L. No. 104-208, 110 Stat. 3009-271 (1996). Because the revised Amendment threatened to deprive AALS member schools of millions of dollars in federal funding, the AALS Executive Committee was forced to address the conflict between the Amendment and the AALS nondiscrimination policy. *See* J.A. 253-55 (excerpts from AALS Memorandum 97-46, Aug. 13, 1997).

Ultimately, AALS Executive Director Carl Monk advised member schools of a new AALS "amelioration" policy – a policy that continues to this day:

> [S]o long as the Solomon Amendment remains in effect in its current form, each member school will be free to choose whether to continue to comply with the [AALS] bylaw requirements as it applies to the military. Schools that choose not to comply will have their noncompliance excused so long as they engage in appropriate activities to ameliorate the negative effects that granting access to the military has on the quality of the learning environment for its students, particularly its gay and lesbian students.

J.A. 253-54. The Monk memorandum offered several examples of ameliorative steps, including: informing students that the military discriminates in a manner that violates the school's established policy, and that the school would lose valuable federal funds if it barred military recruiters; hosting forums for the discussion of military policy, or, more generally, sexual-orientation based

discrimination; and encouraging and promoting the presence of active lesbian and gay student organizations and the presence of openly gay faculty and staff. J.A. 254.

Although AALS viewed amelioration as the only realistic option in light of the severe consequences of the amended Solomon Amendment, the AALS amelioration policy is not – and never will be – an adequate substitute for its preferred policy of nondiscrimination. This is so because, simply stated, amelioration still permits law schools to facilitate discrimination based on sexual orientation. As the policy's name suggests, it attempts merely to *ameliorate* the negative consequences of a law school "failing to provide an environment that adequately protects its students from the experience of discrimination." J.A. 253.

That amelioration is not the preferred policy of AALS and its members is evident from the AALS response to subsequent changes in the Solomon Amendment and its implementing regulations. For example, in 1999, Congress removed student aid funds from the ambit of the Solomon Amendment. Department of Defense Appropriations Act of 2000, § 8120, Pub. L. No. 106-97, 113 Stat. 1212, 1260 (1999). Because fewer than five AALS members received funding that might be affected by the remaining statute, AALS subsequently determined that noncompliance with the nondiscrimination mandate would no longer be excused. *See* AALS Memorandum 00-2, Jan. 24, 2000, at 1-2. A week after that action, however, the Department of Defense issued interim regulations that threatened to deny *all* federal funds to a law school's *parent* university, even if only the law school (or another "subelement" of the university) actually barred military recruiters. *See* 65 Fed. Reg. 2056 (2000). In light of the severe threat posed by these regulations, the

AALS reinstated its fallback amelioration policy. *See* AALS Memorandum 00-6, Feb. 9, 2000.

5. Because of the increasingly harsh threatened consequences of violation of the Solomon Amendment since 1997, as well as the creation of the AALS amelioration policy, AALS member law schools began permitting military recruiters on campus to varying degrees starting in 1997 – albeit with great reluctance. These schools also undertook a variety of amelioration measures, as required by the AALS.

But as the record makes clear, although the AALS amelioration policy helps to soften the blow of coerced discrimination on law school campuses, it is no substitute for a fully enforced nondiscrimination policy and the expressive power such a policy conveys. *See, e.g.*, J.A. 165 ("Despite devoting considerable effort to amelioration, the adverse effects of allowing discriminatory recruiters to participate in on-campus recruiting events cannot be cured."). As one dean stated in informing the law school community that military recruiters would be permitted to use the career services office facilities: "For many of us, a policy of non-discrimination on the basis of sexual orientation reflects a fundamental moral value," and thus a great deal of "pain will result from this action" – regardless of the existence of ameliorative measures. J.A. 44; *accord* J.A. 141. Faculty members at another law school detailed this pain, explaining that allowing military recruiters to co-opt the law school's facilities "conscripts us into complicity with policies that unjustly degrade fellow persons." J.A. 172.

For their part, many gay, lesbian and bisexual students felt "betrayed" by their schools' capitulation, and suffered from "disillusionment at the notion that their school would cooperate with the suppression of their opportunity to

express themselves fully and to avail themselves of all the rights and privileges afforded to their straight peers." J.A. 212; *see, e.g.*, J.A. 40-41, 141-44, 163-64, 201, 207-09, 231-32, 240-43. Amelioration provided cold comfort at best, as these students, "[i]nstead of feeling the safety promised by the commitment to acceptance, diversity, and the prohibition of sexual orientation discrimination, . . . felt the danger of the instability of those guarantees." J.A. 213.

6. Although nearly all law schools bent to the government pressure at some point after 1997, they did not initially provide the military exact parity to other recruiters. Rather, as the version of the Solomon Amendment in force through 2005 required, law schools provided "entry to campuses or access to students on campuses." National Defense Authorization Act for Fiscal Year 1995, § 558, Pub. L. No. 103-337, 108 Stat. 2663 (1994). Thus, many schools permitted the military recruiters to reserve rooms on campus and obtain mailing lists for students, but would not affirmatively assist military recruiters via career service office channels. *See, e.g.*, J.A. 59-60, 84, 137-38, 154-56, 180-81, 218-19. During this period, military recruiters expressed satisfaction with these measures, which – although not the same treatment given to other recruiters – granted the military access to campuses and students as the statute required. *See, e.g.*, J.A. 60, 156, 161.

Nevertheless, law schools' compliance with the letter of the Solomon Amendment was not enough for the military and Congress. In December of 2001, the military sent letters to a targeted group of law schools to insist that they treat military recruiters equally to other recruiters in all respects. *See* J.A. 61-62, 83-90, 139, 161, 192, 198, 220-21.

Yale Law School's experience tellingly demonstrates that this recent insistence on complete equality for the military is grounded in symbolism, not need. *See* J.A. 82-92, 107-33. Yale had consistently permitted military recruiters to meet students on campus and had provided the recruiters with access to student contact information, but had not permitted them to participate in the school-sponsored off-campus interview program. *See* J.A. 82-84. When the military threatened to take action against Yale for this disparate treatment during 2001 and 2002, Yale University's president eventually bent to the military's pressure and offered full on-campus access, including personnel to schedule interviews. *See* J.A. 88-89, 120-22. But the military rejected this proposal because the Yale personnel involved were from Yale *College*, not Yale *Law School*. *See* J.A. 91, 128-33. When Yale finally relented to the military's insistence on participating in the law school program, three branches of the military sent JAG recruiters to sit in empty interview rooms at Yale, knowing full well that not a single student had expressed interest in interviewing. *See* J.A. 90.

Other law schools' experience similarly shows that the military's recent insistence on complete equality stems from a desire to suppress the law schools' message – not actual need. For instance, since 1997, USC Law School permitted military recruiters to interview on-campus and provided them with numerous other services, but did not allow them to participate in the school-sponsored off-campus interview program. *See* J.A. 59-60. Although the Chief Judge Advocate initially *thanked* USC for these accommodations, *see* J.A. 60, the military claimed in 2002 that USC was in violation of the Solomon Amendment for failing to treat the military identically to other recruiters, *see* J.A. 61, and warned USC that the military no longer "'want[ed] to play

games' with the law schools," J.A. 63. The military similarly threatened Harvard Law School for allowing on-campus military recruiting (but without Harvard personnel to arrange the interviews), *see* J.A. 137-38, and Boston College Law School for allowing on-campus military recruiting (but placing military recruiting literature in the library rather than the career services office), *see* J.A. 219-20.

Thus, the court of appeals was correct to conclude that "it was in apparent response to the law schools' ameliorative measures – their efforts to 'distance themselves' (in the District Court's words) from the military's position – that the DOD and eventually Congress insisted on equal treatment for military recruiters." Pet. App. 36a. That symbolism – not need – underlies the government's increasingly strict view of the Solomon Amendment is exemplified by the remarks of the Deputy Undersecretary of Defense to the President of Yale University, in an extensive letter setting forth the Defense Department's 2003 ultimatum: "[B]y singling out military recruiters, Yale sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that Yale permits to participate in its CDO programs." J.A. 132. Similarly, the government's lack of need is made clear by its failure to submit *any* evidence in this case to support its claims of need. *See* Pet. App. 2a n.2.

7. In 2004, while this litigation was pending, Congress amended the Solomon Amendment to formalize what had been the Department of Defense's informal policy of demanding complete parity. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, § 552, Pub. L. No. 108-375, 118 Stat. 1811, 1911 (2004). The Solomon Amendment now withdraws federal funding to *all* parts of any university if a "subelement" of that

university – such as a law school – does not affirmatively assist military recruiters in providing access to campus and students "in a manner that is at least equal in quality and scope to the access . . . that is provided to any other employer." 10 U.S.C. § 983(b)(1). As with the previous iterations of the Solomon Amendment, Congress neither considered nor cited any actual evidence that military recruiting would be jeopardized absent this more restrictive regime. Rather, legislators relied on one Defense Department official's feelings that on-campus "intransigence and opposition" was "intolerable," particularly "now, at a time when our nation is at war." H.R. Rep. No. 108-443(I), at 7 (2004) (letter of Under Secretary of Defense for Personal Readiness to House Armed Services Committee).

SUMMARY OF ARGUMENT

As AALS and its members have long stated and believed, law schools must not only provide tangible assets to create an optimal educational environment, but must also provide a supportive, nurturing, and positive learning atmosphere, in which students and professors can feel free to interact without fear of discrimination. To this end, AALS requires as a condition of membership that schools make available their job-placement facilities and resources only to prospective employers who do not discriminate in hiring. Providing a nondiscriminatory environment lies at the heart of the law school mission for the 166 AALS members, all of whom have a strong interest in conveying their message that discrimination in the law school community is unacceptable.

Because the military openly discriminates in employment on the basis of sexual orientation – one of the types of invidious discrimination prohibited by AALS policy for well over a decade – the Solomon Amendment presents AALS

members with a Hobson's choice: Either the university must forsake millions of dollars of federal funds largely unrelated to the law school, or the law school must abandon its commitment to fight discrimination, in direct violation of AALS policy. By coercing law schools into providing equal access and assistance to military recruiters and restricting their core message of nondiscrimination, the Solomon Amendment violates the expressive and associational rights of AALS members.

Despite the government's present claims, the Solomon Amendment – particularly, its recent, more severe iterations – was not enacted to address an actual crisis in military on-campus recruiting. Rather, as the government's statements and conduct have made clear, this policy was "aimed at the suppression of ideas," U.S. Br. at 15 – namely, the perceived sentiment of AALS member schools "that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations" that participate in on-campus recruiting. J.A. 132. Thus, despite that law schools have accommodated military recruiters through various arrangements, the military has been unsatisfied with anything short of completely equal treatment – and the message that such equal treatment sends.

To minimize the damage inflicted on law school communities by the Solomon Amendment, AALS adopted an "amelioration policy" in 1997. This policy excused member schools from complying with the standard AALS policy on nondiscrimination in job recruiting, so long as schools took certain ameliorative steps to help restore an atmosphere of tolerance and respect on campus despite the presence of discriminatory recruiters. But the amelioration policy was not – and was never intended to be – a substitute for the nondiscrimination policy of AALS or its members.

Rather, AALS considers amelioration to be a far inferior alternative means for law schools to disseminate their message of nondiscrimination. Under the First Amendment, it is the prerogative of the AALS and its member schools – and not the United States government – to determine how best to express the nondiscrimination principles in which these schools so strongly believe.

ARGUMENT

I. THE SOLOMON AMENDMENT VIOLATES LAW SCHOOLS' FIRST AMENDMENT RIGHTS.

The Solomon Amendment violates at least two First Amendment rights of law schools – the right of expressive association and right to be free from compelled speech.

A. The Solomon Amendment Violates Law Schools' Right of Expressive Association.

The court of appeals properly recognized that law schools "qualify as expressive associations" entitled to constitutional protection. Pet. App. 16a; *accord id.* at 144a (district court opinion). In addition to training students in the law, AALS member schools are committed to inculcating values and principles of justice in their students and to "foster[ing] devotion to professional ideals" though word and deed. J.A. 195 (quotation marks omitted); *see supra* pp. 2-6. As this Court recognized in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), it is "indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Id.* at 650; *see also, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop

good morals, reverence, patriotism, and a desire for self-improvement").

AALS and its members schools have long believed that discrimination contravenes their educational mission of inculcating principles of justice, and endangers the inclusive learning environment necessary to teach those principles effectively. *See, e.g.*, J.A. 211-12. Law schools thus have expressed and enforced principles of nondiscrimination in all aspects of the law school experience – including recruiting by prospective employers. *See supra* pp. 2-6.

The enactment and enforcement of nondiscriminatory recruiting policies are therefore integral to AALS member law schools' expressive mission. By denying access to recruiters that discriminate, a law school gives substance to the pedagogical message that bigotry and intolerance will not be permitted on campus, and demonstrates that the school will not discriminate or abet others that do. These nondiscrimination policies allow law schools to expressly "communicat[e] through word and deed" the "values of equal participation and non-discrimination that are critical to the educational mission." J.A. 195; *see supra* pp. 3-4.

The nature and sincerity of the law schools' nondiscrimination message is undisputed in this case. Indeed, the associational message protected in *Dale* was far less explicit than the nondiscrimination principle expressly and unequivocally conveyed in the policies of the AALS and its member schools. *See Dale*, 530 U.S. at 651-52 (deferring to the Boy Scouts' assertion that homosexual conduct was inconsistent with the values "embodied" in the Scout Oath and Law, even though the oath and the law did not expressly mention sexuality or sexual orientation); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,

515 U.S. 557, 562 (1995) (recognizing parade organizers' First Amendment right to exclude speakers, even though the organizers "had no written criteria and employed no particular procedures for admission" to parade).

The Solomon Amendment significantly impairs the law schools' expressive efforts by requiring federally funded schools to suspend their nondiscrimination policies, and not only permit, but facilitate, activities the schools actively seek to condemn. As AALS has explained to its members, "[t]he fundamental policy condemning discrimination with respect to the admission of applicants and the hiring of faculty and staff would be seriously undermined if those non-discrimination principles were abandoned when law students seek employment in the legal profession." AALS Memorandum 96-15, May 28, 1996, at 2. The faculty of AALS member schools similarly and overwhelmingly attest that "abetting a discriminatory employer's recruiting efforts undermines the values of the Law School," and significantly interferes "with the quality of the Law School's educational environment." J.A. 196, 213; *see also, e.g.*, J.A. 69.

The record clearly demonstrates the extent to which the Solomon Amendment has muddled the law schools' message of nondiscrimination. As students told a professor after their school made an exception to its nondiscrimination policy for the military, "the only message they could derive from abandonment of the Non-discrimination Policy was that the Law School was not really as serious about its commitments as promised." J.A. 212. Similar effects have been felt at the other law schools that have adopted amelioration policies, as pedagogical lessons about commitment to equality and justice only breed cynicism and generate feelings of betrayal and disillusionment, particularly among gay, lesbian, and bisexual students. *See* J.A. 212-13, 232, 260-61, 264-67.

As the record brings into sharp relief, a law school cannot effectively teach principles of equality and nondiscrimination when it affirmatively assists an employer that openly discriminates against individuals based upon their sexual orientation. J.A. 232. Indeed, the "Do as I say, not as I do" method has never proved to be an effective teaching model in any setting. However much a law school touts its commitment to tolerance and diversity, suspending its nondiscrimination policy and affirmatively assisting military recruiters significantly impairs the law school's "ability to disseminate" its nondiscrimination message. *Dale*, 530 U.S. at 654. Moreover, just as courts must "give deference to an association's assertions regarding the nature of its expression, [they] must also give deference to an association's view of what would impair its expression." *Id.* at 653; *see also, e.g., Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981). Thus, as in *Dale*, the Court should defer to the law schools' reasoned and experienced judgments about the ill effects of the Solomon Amendment on their associational expression.

The United States claims that *Dale* is inapplicable here because there is purportedly "no serious risk" that the military's policies "would be regarded by the school's students or faculty, or by the outside world, as reflecting the views of the school." Pet. at 13. As an initial matter, the United States has not supported this claim with any evidence, and the record suggests that the contrary is true, as students and faculty alike have understood the law schools' capitulation to demonstrate a lack of true commitment to their gay, lesbian, and bisexual students. *See* J.A. 212-13, 232, 260-61, 264-67. More important still, the government has erroneously assumed that attribution is a prerequisite to

establishing a violation of the right of expressive association. In *Dale*, for example, the Court did not require attribution for an expressive association claim; rather, the Court demanded only a showing that the forced inclusion of an unwanted member "significantly affect[s]" an association's "ability" to express its viewpoint. *Dale*, 530 U.S. at 650. As discussed above and as the record shows, there is no doubt that the Solomon Amendment has markedly affected AALS members' ability to express their nondiscrimination message.

The government has completely failed to justify this infringement on law schools' right of expressive association. The United States may well have a compelling interest in recruiting talented military lawyers, but the Solomon Amendment is not narrowly tailored to achieve that end. To the contrary, as the court of appeals explained, the Solomon Amendment could not have been drawn "more broadly." Pet. App. 23a. Moreover, no iteration of the Solomon Amendment – particularly not the recent version demanding absolute equality – has been animated by any evidence of a crisis in military recruiting. Indeed, the government has failed to offer *any* evidence in this case to substantiate its claimed needs. *See id.* at 2a n.2. This glaring absence of evidence exposes what has been true of the Solomon Amendment since its adoption in 1994 – that it is symbolic legislation aimed at the suppression of ideas.

For example, although the Solomon Amendment's initial supporters cited military recruiting needs as a justification, the military had no difficulty recruiting qualified lawyers prior to 1994. Rather, as made clear by Representative Pombo, co-sponsor of the law, the point of the Amendment was to "'send a message over the wall of the ivory tower of higher education,'" to combat the "'growing, and misguided, sense of moral superiority.'" Pet. App. 91a n.2 (quoting 140

Cong. Rec. H3863 (1994)). As Representative Pombo put it, colleges and universities must "know that their starry-eyed idealism comes with a price." *Id.*

Symbolism has continued to underlie the progressively stricter iterations of the Solomon Amendment. After the passage of the version of the Amendment in force through 2005 requiring "entry to campuses" and "access to students," law schools accommodated military recruiters by permitting them to use on-campus rooms and obtain student mailing lists, but not affirmatively assisting them via career service office channels. The military at first expressed satisfaction with these accommodations, but since 2001 – "in apparent response to the law schools' ... efforts to 'distance themselves' ... from the military's position," Pet. App. 36a – the military began insisting on equal treatment in *all* respects, despite no evidence of a threat to military recruiting efforts. Indeed, when the military received equal treatment at Yale, for example, it sent recruiters to sit in what it knew would be empty interview rooms, just to make a point. J.A. 90; *see* J.A. 132 ("[B]y singling out military recruiters, Yale *sends the message* that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations." (emphasis added)). Similarly, in passing the version of the Solomon Amendment presently in force, Congress did not rely on evidence that military recruiting would be jeopardized absent a more restrictive regime, but instead was motivated by the sentiment that on-campus "intransigence and opposition" was "intolerable," particularly "now, at a time when our nation is at war." H.R. Rep. No. 108-443(I), at 7 (2004).

In sum, the United States has failed to demonstrate any compelling interest that overrides the Solomon Amendment's clear interference with law schools' right of

expressive association. Indeed, the evidence demonstrates that the government's efforts have been animated by symbolism, not need – and therefore cannot stand.

B. The Solomon Amendment Violates Law Schools' Right to be Free from Compelled Speech.

As the court of appeals held, because the Solomon Amendment compels AALS members to "propagate, accommodate, and subsidize" the military's message, it violates those law schools' First Amendment right to be free from compelled speech. Pet. App. 27a. Under the compelled speech doctrine, "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 574-75. Compelled access impermissibly "forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 9 (1986). Yet compelled expression is precisely what the Solomon Amendment mandates through its funding restrictions.

The court of appeals properly recognized that recruiting is an expressive activity, as it necessarily involves "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." Pet. App. 28a (quotation marks omitted). Indeed, the government concedes that recruiting is speech. *See* Pet. at 13 (stating that "recruiters speak for the employers they represent"). And here, the military's recruiting message that law schools abhor is easy to identify – that discrimination on the basis of sexual orientation is acceptable and appropriate.

By requiring access "equal in quality and scope" to that afforded other employers, the Solomon Amendment forces law schools affirmatively to assist the military in spreading a

message with which they strongly disagree, by providing the military with the same communicative services offered to employers who do not discriminate. These services all involve core communicative activities: disseminating literature in student mailboxes, posting job announcements on school bulletin boards, maintaining leaflets in binders for reference by students, publishing employer information in the school catalog, emailing students about military recruiters' arrivals, scheduling appointments for students, and supplying private meeting rooms for discussions between military recruiters and students. *See, e.g.*, J.A. 94, 219, 235. Just as the government may not compel a private company to disseminate an unwanted message in its billing envelopes, *Pacific Gas*, 475 U.S. at 12-16, or force a motorist to display a four-word government motto on his license plate, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), or force a newspaper to print particular opinion pieces, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), it cannot force a private university to disseminate, carry, or host the military's recruiting message.

The government argues that Respondents' compelled speech claim fails because, as with their expressive association claim, there is no "realistic danger that the statements of military recruiters will be uniquely attributed to the school." Pet. at 15. But once again, the government has provided no evidence to that effect; if anything, the record reflects that students and faculty alike have viewed law schools' capitulation to the government's pressure as a sign that the schools do not really believe in the nondiscrimination they preach. In any event, the government erroneously assumes that attribution is necessary to establish a compelled speech violation. That is not the law. Message attribution has never been a prerequisite to a

compelled speech claim. *See, e.g., Pacific Gas*, 475 U.S. at 7 (finding a compelled speech violation even though the unwanted speaker stated that its messages were not those of the plaintiff utility company). Rather, the Court's compelled speech jurisprudence focuses on the forced "dissemination" of the unwanted message – not the perceived adoption of the message. *See Wooley*, 430 U.S. at 713 (holding that First Amendment protected individual's right not to be a "courier" for the state's message). Thus, even if there were no danger that the government's recruiting message could be attributed to host law schools, the Solomon Amendment would still violate the First Amendment by forcing those schools to abet and disseminate the government's unwelcome message.

II. LAW SCHOOLS' IMPLEMENTATION OF THE AALS AMELIORATION POLICY DOES NOT CURE THE FIRST AMENDMENT VIOLATION INFLICTED BY THE SOLOMON AMENDMENT.

At several points in its brief, the government suggests that any constitutional flaws in the Solomon Amendment may be remedied through law school disclaimers and a variety of other ameliorative measures. *See, e.g.*, U.S. Br. at 7-8, 22, 29, 42. Such reliance on amelioration as a cure-all for the infirmities of the Amendment is wholly misplaced, and ultimately exposes the weakness in the government's effort to insulate the law from meaningful First Amendment review. It also belies the government's claims of military need, for if the government readily accepts the schools' ameliorative efforts – which the schools pursue only against discriminatory employers like the military – why does the government insist on complete parity in all other respects?

Indeed, were the government's analysis correct, grave intrusions on associations' First Amendment rights would be

rectified simply by the associations' ability to express disagreement with the government's compelled message. But that has never been the case. The constitutional harm in *Dale*, for example, was not cured simply by the Boy Scouts' ability to issue a press release condemning their openly gay assistant scoutmaster. Nor were the parade organizers' First Amendment interests in *Hurley* protected merely because they could protest the inclusion of an unwanted gay, lesbian, and bisexual marching group by displaying signs and banners denouncing homosexuality. So, too, the AALS amelioration policy is no remedy for the First Amendment injury inflicted by the Solomon Amendment.

A. Amelioration Was Never Intended, and Cannot Serve, as a Substitute for the Law Schools' Message and Policy of Nondiscrimination.

Through a strict policy of nondiscrimination applicable to all aspects of the law school experience, AALS and its member schools have demonstrated a clear and unequivocal desire to create an open, tolerant learning environment, and to send the message that discrimination in any form will not be permitted. Indeed, the AALS nondiscrimination policy is based on the belief shared by AALS and its members that "individuals with a diversity of backgrounds enrich the discourse and educational energy in a classroom and throughout the institution [and that] [s]uch individuals will not participate freely unless their school accords them equal respect, dignity, and protection from discrimination." J.A. 195-96. The presence of, and compelled assistance to, recruiters who discriminate – whether the military or any other employer – necessarily frustrates that purpose. While law schools surely can and should take steps to minimize the harmful effects of compelled discriminatory recruiting on campus, amelioration does not cure the constitutional

problem created by forcing law schools actively to assist the dissemination of a discriminatory message.

As is evident from the history of the AALS amelioration policy, it was never intended to serve as a satisfactory replacement for the preferred policy of nondiscrimination. Rather, amelioration arose *in response* to the Solomon Amendment, and even then only when the AALS member schools (and their parent universities) faced the potential loss of millions of dollars in federal funding. Indeed, as the Solomon Amendment and its implementing regulations evolved over the past decade, AALS permitted amelioration to replace its pure nondiscrimination mandate only as a last resort. *See supra* pp. 8-11.

Nor does amelioration in fact operate as an adequate substitute for an active policy of nondiscrimination. The activities suggested by the AALS serve only as a countermeasure against the demonstrated "negative effect on the law school's environment of the military's discriminatory practices." AALS Memorandum 02-03, Jan. 18, 2002, at 3. The inadequacy of law schools' amelioration policies, as a practical matter, is evident from the numerous accounts in the record describing students' feelings of disillusionment and betrayal, despite schools' attempts to minimize the adverse effects of allowing military recruiting on campus. *See supra* pp. 11-12.

B. The First Amendment Protects the Law Schools' Right to Choose Their Preferred Means of Expressing Their Message of Nondiscrimination.

Not only is amelioration insufficient as a matter of fact, but the government's reliance on available ameliorative measures ignores a fundamental First Amendment precept – that the speaker, not the government, has the constitutional

right to determine for *itself* the appropriate means and method of expression. The First Amendment "protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). As this Court held in *Dale*, the First Amendment firmly protects an association's "*method* of expression." *Dale*, 530 U.S. at 655 (emphasis added). Thus, the government's claim that a law school is "free . . . to express its disagreement" with the military's policies, Pet. at 13, rings hollow, as the Solomon Amendment does not leave law schools free to express their disagreement in a manner they deem most effective and appropriate.

This Court has consistently protected an association's First Amendment right to choose for itself its method of expression. For example, in *Dale*, the First Amendment protected the Boy Scouts' chosen method of expression – even where that message was partly conveyed by requiring Scout leaders to avoid questions on sexuality altogether and "teach only by example." 530 U.S. at 655. And in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982), the Court held that community leaders had a constitutional right, grounded in the First Amendment, to bolster their message of protest against a discriminatory organization in a manner of their choosing, including refusing to support or abet that organization. Similarly, AALS and its members have chosen to convey their message of tolerance and equality through a policy prohibiting discriminatory recruiting – in the time-honored tradition of "nonviolent, politically motivated boycott designed to force governmental and economic change." *Id.* at 914. The availability of other, less effective avenues of communicating this message cannot supplant the schools' chosen method of expression. As this Court has

explained, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (quotation marks omitted); *see, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. N.J.*, 308 U.S. 147, 163 (1939).

Not only is amelioration not the preferred message of AALS and its members, but the amelioration policy is the direct result of "impermissible pressure" created by the Solomon Amendment to respond – or else be forced to appear to agree with and condone the military's discriminatory views. *Pacific Gas*, 475 U.S. at 15 n.11. This Court has recognized that such a "forced response is antithetical to the free discussion that the First Amendment fosters." *Id.* at 16. Posting disclaimers, or otherwise attempting to ameliorate the effect of military recruiting, unlawfully compels law schools to "to alter their speech to conform with an agenda they do not set." *Id.* at 9.

Indeed, because of the heightened constitutional value and importance of academic freedom, *see, e.g., Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Keyishian v. Board of Regents of University of New York*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 250 (1957); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 237 n.3 (2000) (Souter, J. concurring in the judgment), an educational institution's expressive choices are accorded greater protection than other institutions outside of the academy. An academic institution has a right firmly grounded in the First Amendment "to determine for itself on academic grounds," not just "who may teach," but also

"what may be taught, [and] *how* it shall be taught." *Sweezy*, 354 U.S. at 263 (Frankfurter, J. concurring).

In any event, even if contrary to logic and the record evidence the amelioration measures pursued by AALS members were deemed to be adequate substitutes for the law schools' preferred expression, they would not cure the unconstitutionality of the Solomon Amendment. Violations of AALS members' First Amendment rights are not remedied simply by a speaker's ability to pursue secondary or tertiary means of communication – regardless how effective a court deems those means to be. *See, e.g., Pacific Gas*, 475 U.S. at 15 n.11 ("[t]he presence of a disclaimer . . . does not suffice to eliminate the impermissible pressure on appellant to respond to [unwanted] speech"); *Wooley*, 430 U.S. at 714; *Tornillo*, 418 U.S. at 255-58; *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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September 21, 2005

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